Filed 10/16/19 P. v. Corona CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALONSO CORONA, Defendant and Appellant.	F075515 (Kern Super. Ct. No. BF161200C) **ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

THE COURT:

Pursuant to California Rules of Court, rule 8.264(c)(1), the court makes the following modification to the September 18, 2019, opinion filed in this matter:

1. The last sentence on page 12 continues to the top of page 13. This sentence states, "If so, then the jury had to decide whether defendant was also guilty of second degree murder, attempted murder, voluntary manslaughter, attempted voluntary manslaughter, or unlawful assembly (hereinafter the nontarget offenses)." The words "unlawful assembly" in this sentence are deleted. In their place, the words "shooting at an inhabited dwelling" are inserted.

This modification does not change the appellate judgment. (Cal. Rules of Court, rule 8.264(c)(2).)

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P.J.

MEEHAN, J.

Filed 9/18/19 P. v. Corona CA5 (unmodified opinion)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALONSO CORONA, Defendant and Appellant.	F075515 (Kern Super. Ct. No. BF161200C) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, Sarah J. Jacobs and Ian P. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted appellant/defendant Alonso Corona of first degree premeditated murder for the shooting death of Victor Anaya (Pen. Code, § 187, subd. (a);[1] count 1). The jury also convicted defendant of attempted premediated murder involving another victim, David Anaya,[2] stemming from the same incident (§§ 664/187, subd. (a); count 2). The jury found true that defendant committed these crimes to benefit a criminal street gang (§ 186.22, subd. (b)(1)), and that, during these offenses, at least one principal intentionally and personally discharged and personally used a firearm that proximately caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The jury, however, did not find true that defendant personally inflicted great bodily injury upon David during the attempted murder.

Stemming from the same incident as counts 1 and 2, the jury convicted defendant of shooting at an inhabited dwelling (§ 246; count 3) and conspiracy to commit a crime (§ 182, subd. (a)(1); count 4). In these counts, the jury also found true gang enhancements (§ 186.22, subd. (b)(1)). In count 3 (shooting at an inhabited dwelling), the jury determined that at least one principal intentionally and personally discharged a firearm (§ 12022.53, subds. (c), (e)(1)). In count 4 (conspiracy), the jury determined that defendant used a firearm (§ 12022.5, subd. (a)). Defendant was sentenced to an aggregate prison term of 82 years to life.

The parties agree, as do we, that instructional errors occurred with CALCRIM No. 402 (the natural and probable consequences doctrine) and CALCRIM No. 417 (conspiracy). In giving these instructions, the trial court incorrectly inverted the target offense and the nontarget offenses. Based on these errors and other jury instructions, we

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[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] Because Victor and David share the same last name, we will refer to them by their first names to avoid confusion.

agree with defendant that it is possible the jury relied on the natural and probable consequences doctrine to find him guilty in count 1 for first degree premeditated murder as an aider and abettor. However, this is a legally invalid theory for such a conviction. (*People v. Chiu* (2014) 59 Cal.4th 155, 158–159 (*Chiu*) ["an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]"].) Based on this record, it is impossible to ascertain how the jury determined guilt in count 1. As such, because we cannot declare beyond a reasonable doubt that the jury based the conviction in count 1 on a legally valid theory, we must reverse defendant's conviction and modify it to second degree murder. Upon remand, however, the prosecution may accept that reduction or retry the premeditation and deliberation allegation.

We reject defendant's remaining claims. We disagree with his assertion that his conspiracy conviction in count 4 was based on an invalid legal theory. We find harmless the instructional errors in relationship to his convictions for attempted murder (count 2) and shooting at an inhabited dwelling (count 3). We determine that his claims of prosecutorial misconduct are forfeited due to his failure to object below, and he does not demonstrate ineffective assistance of counsel. Based on the sentencing record, we conclude that a remand is not warranted for the court to exercise its discretion to strike or dismiss the imposed firearm enhancements following Senate Bill No. 620 (Stats. 2017, (Stats. 2017, ch. 682) (Senate Bill 620).

Finally, on January 1, 2019, Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437) became effective. This amended the felony-murder rule and the natural and probable consequences doctrine as it relates to murder. We asked the parties to brief the impact, if any, Senate Bill 1437 had on the issues in this matter. Defendant asserts that count 1 qualifies for resentencing, a point which is moot because we will reverse that count. Regarding count 2, defendant contends that this court should decide as a matter of

statutory interpretation that *attempted* murder also qualifies for resentencing under Senate Bill 1437. We need not address that issue. Senate Bill 1437 "should not be applied retroactively to nonfinal convictions on direct appeal." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727; see also *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153 [adopting *Martinez*'s analysis and holding].) As such, we will not consider the merits of defendant's Senate Bill 1437 claims.

We reverse count 1 and modify that conviction to second degree murder but give the People the opportunity to retry the premeditation and deliberation allegation. In all other respects, we affirm the judgment.

BACKGROUND

We summarize the material trial facts. We provide additional facts later in this opinion when relevant to specific issues raised on appeal.

I. The Shootings at the House Party

The events in question transpired at a house party in Kern County. Upwards of 75 to 100 people attended the party throughout the night and into the early morning hours of August 15, 2015. Defendant was a gang member when these events occurred. He belonged to a gang known as CSB, which stood for either Can't Stop Banging or Can't Stop Balling.

The prosecution established that defendant attended the house party. In addition to eyewitness testimony confirming defendant's presence, defendant's DNA was located on an empty beer bottle recovered at that house after these events. Defendant arrived at the party around midnight with about 10 other CSB members. The group had not been invited to the party, but someone had received a text message about it. That night, defendant wore a white T-shirt and a blue "L.A." hat.

Jose Montoya attended the party with defendant. Montoya was the younger brother of defendant's girlfriend. Defendant referred to Montoya as his brother-in-law.

The trial evidence established that defendant was armed when he attended this party. A CSB gang member, Collin Alvarado, testified that he saw both defendant and Montoya each with handguns in the evening before this party started. Other witnesses saw defendant at the party in possession of a gun.

As the party began to wind down in the early morning hours, the CSB members were asked to leave. The situation became tense. Some of the CSB members appeared upset and they did not readily agree to leave. Eventually, the CSB group moved to the front yard.

In the front yard, more words were exchanged between the CSB group and the males escorting them out of the house. There were about 15 males all together. A CSB member said, "We're not going to leave until this gets resolved." Victor, the murder victim, initially tried to calm down the situation. A CSB member was heard saying, "You think we're not going to do anything?" A member in the CSB group also said something like "I'm going to show you what I'm going to do." Defendant was present in the front yard when these exchanges occurred. As the situation became tense, a CSB gang member said, "We are just going to f[**]k these fools up." Defendant appeared mad. He said things like, "I don't give a f[**]k if this is your house." A fellow gang member told defendant something like, "[W]hatever you want to do, I'm with you."

A fist fight ensued. During the fight, multiple witnesses heard two separate volleys of shots. The first volley involved two shots. The second volley occurred about a minute later, and it involved anywhere from three to five shots. The witnesses described two shooters, one wearing a white shirt and blue hat. The second shooter wore dark clothing. The shots originated from the CSB group.[3]

[3] Neither Victor nor David, the two shooting victims, were armed when these events occurred.

At trial, the prosecution established that defendant fired the first volley of two shots. David, the victim of the attempted murder, testified that he saw defendant draw a black handgun, point it at Victor, and fire two shots. David ran at defendant and began wrestling him for the gun. They ended up wrestling on the hood of a car. While they struggled, defendant slid his weapon across the hood to another person. David eventually broke free and ran towards the house. David reached the front door and, as he opened it, he heard multiple shots. He was struck once in his mid-back. David woke in the hospital. While hospitalized, he spoke with detectives. He identified defendant in a photographic lineup as the person who fired two shots at Victor. David was 70 percent certain of his selection when he made it. At trial, David identified defendant as the suspect who shot twice at Victor. He said that Victor's shooter had worn a white shirt and a blue hat.

Another witness, J.L., saw a CSB member push Victor, who pushed back. The CSB member drew a firearm from his waistband, and Victor began struggling with this person over the firearm. J.L. heard two shots, but he did not see who fired those shots. After these events, J.L. selected defendant's photograph as the person he saw draw a firearm and struggle with Victor. At the time he made this selection, J.L. was 75 percent certain. At trial, however, J.L. said he did not recognize defendant in court.

A fellow gang member, Alvarado, testified that he was involved in the fight. During the brawl, he heard two shots fired. He then saw defendant running away with a "pistol."

II. Law Enforcement's Investigation

Police officers were dispatched to the house party at about 2:12 a.m. on August 15, 2015. Victor suffered two gunshot wounds. One shot went through his torso but did not pierce any vital organs. The other bullet pierced an artery, which caused death within minutes due to internal hemorrhaging.

David underwent surgery and he was hospitalized for multiple weeks. At the time of his trial testimony, he was still disabled.

Fresh bullet strikes were found on vehicles parked in front of the residence. Bullet strikes were also seen near the residence's front door, and on its wall. At trial, a police sergeant opined that the multiple shots had been fired from "two different positions."

Police recovered two 9-millimeter shell casings in the front yard. Later testing confirmed that the two 9-millimeter casings had been fired from the same weapon. In addition, fragments of a projectile were recovered from Victor's body during his autopsy. Testing suggested that the projectile removed from Victor's body came from a .38- or a .357-caliber firearm.

During its investigation, police learned from a source that defendant and Montoya had been responsible for this shooting. This information had originated from defendant's brother. About four days after this shooting, an arrest warrant was issued for Montoya for the charge of first degree murder.[4]

III. The Defense Evidence

Defendant's mother and his girlfriend (the mother of his child) testified on his behalf. They collectively asserted that defendant was home with them on the night in question. Defendant's birthday was August 14, and they had stayed home to celebrate. The following day, defendant was home in the morning, but he then disappeared.

The parties stipulated that defendant's fingerprints were not located at the shooting scene.

DISCUSSION

I. The Conspiracy Charge in Count 4 was Based on a Valid Legal Theory

In count 4, defendant was convicted of conspiracy to commit a crime in violation of section 182, subdivision (a)(1). The prosecution asserted that defendant had conspired

[4] Montoya was not a party in this prosecution.

to violate section 407. Under this statute, "[w]henever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." (§ 407.)

Defendant argues that his conspiracy conviction in count 4 could be based on a theory that he conspired to commit a lawful act in a violent manner (i.e., the second prong of § 407). He contends that this second prong cannot serve as a valid basis for conspiracy because a person cannot conspire to commit a lawful act. He further maintains that a lawful assembly could turn violent (i.e., unlawful) due to reasons beyond the conspirators' control or intent. He asserts that it is impossible to know how the jury determined guilt for conspiracy, and he insists that reversal of this conviction is required. These arguments are meritless.[5]

Conspiracy is defined as two or more people agreeing to commit any crime coupled with proof of the commission of an overt act by one or more of the parties to that agreement. (*People v. Swain* (1996) 12 Cal.4th 593, 600.) Conspiracy is a specific intent crime. (*Ibid.*) To sustain a conviction for conspiracy to commit a particular offense, a prosecutor must establish that the conspirators intended to agree, but also that they intended to commit the elements of the underlying offense. (*Ibid.*)

Relatively few published opinions discuss the crime of unlawful assembly. The intent for an unlawful assembly may occur either before or at the time of assembling, or it may be formed after the assembling has commenced. (*People v. Kerrick* (1927) 86 Cal.App. 542, 551.) The crime of unlawful assembly "pertains to the assembly at large. [Citation.] Not every member of the assembly must individually commit unlawful acts to render the assembly unlawful. [Citations.] If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the

[5] In his reply brief, defendant makes it clear that this claim is not based on insufficiency of the evidence in support of his conspiracy conviction.

unlawful conduct to disassociate himself from the group." (*In re Wagner* (1981) 119 Cal.App.3d 90, 103.)

Defendant cites no authority, and we have not found any, holding that persons cannot conspire to violate the second prong of section 407. In any event, we conclude that such a conviction is proper. Based on a plain reading of the statute, it is clear that multiple persons could agree to assemble to do a lawful act in a violent manner. Indeed, two or more people could agree to assemble at a political rally, a sporting event or a party, and intend to commit violence during that assembly. Moreover, persons could assemble peaceably and, after the assembly has started, they could agree to use violence. Once violence occurs, an unlawful assembly has resulted. If a member of the conspiracy commits an overt act in furtherance of the agreement to commit violence, a prosecutor could legally establish a conspiracy to violate section 407.

We reject defendant's claim that criminal liability under the second prong of section 407 is "redundant" to the first prong. Assembling to do an unlawful act (the first prong) clearly encompasses conduct not contemplated in the language of the second prong (assembling to do a lawful act in a violent manner). For instance, a group of protestors could, without relying on violence, occupy a government building and shut down its operations. Under the first prong of section 407, that assembly could be deemed unlawful and those knowingly participating could face criminal liability. On the other hand, the same protesters could participate at an otherwise lawful political rally which grew violent. Those protestors who knowingly took part in the violent assembly could face criminal liability under the second prong of section 407. (See *In re Brown* (1973) 9 Cal.3d 612, 623 [holding that the prohibition under section 407 to do a lawful act "must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence"].) In any event, the words of section 407 are clear and unambiguous so we will apply their common meaning. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 640; *Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) The plain statutory

language belies defendant's suggestion that criminal liability cannot occur from the second prong, or that two or more persons could not agree to violate it.

The jury in this matter was told that defendant was charged in count 4 with conspiracy to commit unlawful assembly. With CALCRIM Nos. 415 and 417, the jury was instructed that the prosecution had to prove that defendant agreed with at least one other named person to unlawfully assemble, and defendant held an intent to unlawfully assemble. One member of the conspiracy had to have committed a defined overt act to accomplish the unlawful assembly. One possible overt act was defendant shooting and killing Victor. Another possible overt act was Montoya shooting and injuring David. The jury was told that a member of the conspiracy is criminally liable for any act done to further the conspiracy which was "a natural and probable consequence of the common plan or design of the conspiracy."

With CALCRIM No. 2685, the court informed the jury that the prosecution had to prove that defendant participated in an unlawful assembly. This was defined as "when two or more people assemble together to commit a crime or to do a lawful act in a violent manner. When two or more people assemble to do a lawful act in a violent manner, the assembly is not unlawful unless violence actually occurs or there is a clear and present danger that violence will occur immediately."

During closing argument, the prosecutor told the jurors that they had to decide defendant's intent when he brought a gun to the party and used it to aim and fire at Victor. The prosecutor explained that the charge of conspiracy to unlawfully assemble was based on defendant's intent to provoke a fight in the front yard. Later, the prosecutor stated that unlawful assembly "is basically coming together to commit a crime or coming together to lawfully, [*sic*] but doing it in a violent manner." He also described it as

coming "together to commit a crime or to come together to commit an unlawful act in a moderate way."[6]

The prosecutor asserted that the evidence clearly established "a conspiracy to unlawfully assemble in the front yard." He argued that an unlawful assembly occurred when defendant fired his firearm at Victor in the front yard. According to the prosecutor, because of the unlawful assembly, defendant was liable for second degree murder under a natural and probable consequences theory even if it was Montoya who fired the fatal shot. However, if the jury determined that defendant acted with premeditation, and he was either a direct perpetrator or an aider and abettor, then defendant was guilty of first degree murder.

We reject defendant's claim that he merely agreed to assemble to engage in a lawful act. To the contrary, the evidence overwhelmingly suggested that defendant and the other CSB members assembled in the front yard to provoke a fight. Such conduct violated the first prong of section 407 (an assembly to do an unlawful act). After the assembly began, violence occurred. This violence was an overt act in furtherance of that conspiracy. Thus, even if the evidence suggested that defendant initially assembled with others in a lawful fashion, he nevertheless violated the second prong of section 407. In either event, defendant could be properly convicted of conspiracy to violate section 407.

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[6] Respondent impliedly concedes that the prosecutor misstated the elements of unlawful assembly. Respondent, however, argues that any misconduct was not preserved for appeal and was also harmless in light of the jury instructions given and the prosecutor's remaining closing argument. We need not address any suggested prosecutorial misconduct in this instance because, in his reply brief, defendant admits that he did not present this claim as one of prosecutorial error or misconduct. Instead, defendant contends that the prosecutor's misstatements are further evidence that his guilty verdict in count 4 was not based on a legally valid theory. We reject defendant's arguments. Based on the totality of the jury instructions and the prosecutor's arguments, defendant's conviction for conspiracy to commit unlawful assembly was based on a legally valid theory.

Based on this record, we reject defendant's arguments that his conspiracy conviction (count 4) was based on a legally invalid theory.[7] Under the circumstances of this case, it was legally possible for defendant to be guilty of conspiracy to unlawfully assemble, even under the second prong of section 407. Accordingly, defendant's arguments are without merit, and this claim fails.

II. Because of Instructional Errors, Defendant's Conviction for First Degree Premeditated Murder (Count 1) Must be Reduced to Second Degree or he Must be Retried; the Instructional Errors, However, Were Harmless in Counts 2 and 3

The parties agree that instructional errors occurred. The trial court incorrectly inverted the target offense and the nontarget offenses when it instructed the jury with CALCRIM No. 402 (dealing with the natural and probable consequences doctrine) and CALCRIM No. 417 (dealing with conspiracy). The parties, however, dispute whether or not these errors were prejudicial.

A. The Erroneous Jury Instructions

With CALCRIM No. 402, the court informed the jury that, under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. The jury was told to decide if defendant was guilty of conspiracy as charged in count 4. If so, then the jury had to decide whether defendant was also guilty of second degree murder, attempted murder, voluntary manslaughter,

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[7] Defendant claims that the prosecutor should have charged him with conspiracy to disturb the peace. He argues that such a charge would have avoided the "dual theories of liability" presented under the charge of conspiracy to unlawfully assemble under section 407. He maintains that, by charging both prongs of unlawful assembly as the target of the alleged conspiracy, the prosecutor "opened the door for a possible conviction for a non-criminal conspiracy." We need not respond to these arguments because we have already determined that the prosecution presented the jury with a legally valid theory of criminal liability. In any event, it was the prosecutor who had discretion regarding whom to charge and what charges to bring. (*People v. Birks* (1998) 19 Cal.4th 108, 134.)

attempted voluntary manslaughter, or unlawful assembly (hereinafter the nontarget offenses).

The court instructed that, to prove guilt regarding the nontarget offenses, the prosecution had to establish three elements: (1) defendant was guilty of conspiracy; (2) during the commission of one of the *nontarget* offenses, a coconspirator committed a violation of one of the *nontarget* offenses; and (3) under all of the circumstances, a reasonable person in defendant's position would have known that the commission of the nontarget offenses was a natural and probable consequence of the commission of conspiracy.[8]

The second element in this instruction was erroneous because the court should have instructed that, during the commission of *the target offense* (conspiracy), a coconspirator committed a violation of one of the nontarget offenses. (CALCRIM No. 402.) In other words, the erroneous instruction advised the jury that the natural and probable consequences doctrine applied to conspiracy if the prosecution proved that, during the commission of a nontarget offense, a coconspirator committed a nontarget offense.

With CALCRIM No. 417, the court instructed the jury regarding the liability for coconspirators' acts. The court stated that a member of a conspiracy is criminally responsible for the crimes committed by other members of the conspiracy if that act was done to further the conspiracy, and it was a natural and probable consequence of the common plan or design of the conspiracy. The court instructed that, to prove defendant guilty of the crimes charged in counts 1 through 3, the prosecution had to prove three elements: (1) defendant conspired to commit a violation of section 407 (unlawful assembly); (2) a member of the conspiracy committed *unlawful assembly* to further the

[8] At various times when instructing the jury, the trial court referred to the nontarget offenses merely by their Penal Code sections. We do not approve of this practice because it results in confusing instructions for the jury.

conspiracy; and (3) the nontarget offenses were a natural and probable consequence of the common plan or design of the crime that defendant conspired to commit.

Error occurred regarding the second element in this instruction because the court should have instructed that a member of the conspiracy committed *one of the nontarget offenses* to further the conspiracy. (CALCRIM No. 417.) In other words, the court instructed that defendant was guilty of the nontarget offenses if he entered the conspiracy, a coconspirator committed conspiracy, and the nontarget offenses were a natural and probable consequence of the conspiracy.

B. Analysis

Defendant argues that the jury instructions regarding derivative liability were confusing. He claims that the instructions did not properly explain the natural and probable consequences doctrine. He contends that the verdicts in counts 1 through 3 could be based on legally invalid theories. He relies on *Chiu, supra*, 59 Cal.4th 155. We agree with defendant regarding count 1. However, we reject his arguments regarding counts 2 and 3, and we find the instructional errors harmless for those convictions.

1. Under *Chiu* and Related Authorities, Defendant's Conviction for First Degree Premeditated Murder Must be Reduced to Second Degree Murder or He Must be Retried Regarding the Premeditation and Deliberation Allegation

An aider and abettor may be liable for criminal conduct in two ways. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) First, an aider and abettor may be liable if he or she acts with knowledge of the perpetrator's criminal purpose and also acts with an intent (or purpose) of committing, or encouraging, or facilitating commission of the offense. (*Id.* at p. 1118.) In addition, an aider and abettor may be guilty under the natural and probable consequences doctrine. Under this theory, an aider and abettor may be guilty not only of the intended crime, but also for any other offense which was a natural and probable consequence of the crime aided and abetted. (*Id.* at p. 1117.)

The natural and probable consequences doctrine is based on the principle that aiders and abettors should be criminally liable for the actual harm their actions caused. (*Chiu, supra,* 59 Cal.4th at p. 164.) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) Whether a consequence was reasonably foreseeable "is a factual issue to be resolved by the jury who evaluates all the factual circumstances of the individual case." (*People v. Favor* (2012) 54 Cal.4th 868, 874 (*Favor*); see also *People v. Medina, supra,* 46 Cal.4th at p. 920.)

In *Chiu, supra,* 59 Cal.4th 155, our Supreme Court held that the natural and probable consequences doctrine could not be used to establish an aider and abettor's guilt for first degree premediated murder. (*Id.* at pp. 158–159.) According to *Chiu*, an aider and abettor's liability for premeditated first degree murder must be based on direct aiding and abetting principles. (*Id.* at p. 159.) When an aider and abettor is liable for premeditated murder under the natural and probable consequences doctrine, the appropriate punishment is second degree murder. (*Id.* at p. 166.)

"The *Chiu* opinion did not directly address whether a coconspirator may be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*In re Lopez* (2016) 246 Cal.App.4th 350, 357.) However, in *People v. Rivera* (2015) 234 Cal.App.4th 1350 (*Rivera*), the Court of Appeal addressed that issue. *Rivera* held that the reasoning of *Chiu* applied equally to conspiracy liability. *Rivera* noted that, "when the California Supreme Court in *Chiu* was explaining the natural and probable consequences doctrine, it understood its applicability to both aiding and abetting and conspiracy theories." (*Rivera, supra,* at p. 1356, fn. omitted.)

In this matter, it is undisputed that instructional errors occurred with CALCRIM Nos. 402 and 417. These instructional errors created confusion regarding the proper

application of the natural and probable consequences doctrine. That confusion was further exacerbated by some of the other instructions given in this matter.

In count 4, defendant was charged with conspiracy. It was alleged that defendant conspired to unlawfully assemble in violation of section 407. The jury was instructed that, if defendant was a member of that conspiracy, he was criminally responsible for any act a member of the conspiracy did to further the conspiracy and which was a "natural and probable consequence of the common plan or design of the conspiracy." This was defined as a consequence "that a reasonable person would know is likely to happen if nothing unusual intervenes."

Defendant was charged in count 1 with premeditated murder. At the beginning of the trial, the trial court read the information to the jury, including the charge that count 1 involved an allegation of premeditated murder. During the instructional phase, the court informed the jury that defendant was guilty of the crimes charged in counts 1 through 3 if the following occurred: (1) defendant conspired to violate section 407 (unlawful assembly); (2) a member of the conspiracy violated section 407 to further the conspiracy, and (3) the nontarget offenses "were a natural and probable consequence of the common plan or design of the crime that [defendant] conspired to commit."

The trial court informed the jury that the conspiracy charge in count 4 could form the basis for first degree murder. The court stated that defendant was being prosecuted for first degree murder under three theories: (1) as a perpetrator; (2) under a theory of aiding and abetting; and (3) *based on conspiracy*. The court cautioned the jurors that they could not find defendant guilty of first degree murder unless they all agreed that the prosecution had proven that defendant committed murder, "but all of you do not need to agree on the same theory."

The trial court never informed the jury that it could not find defendant guilty of first degree murder based on the natural and probable consequences doctrine. To the contrary, the court's instructions invited the jury to find defendant guilty of first degree

murder if he was a member of a conspiracy to violate section 407, and a murder (or a lesser included offense) occurred as a natural and probable consequence of that conspiracy. As such, the jury was presented with a legally invalid theory. (See *Chiu, supra,* 59 Cal.4th at pp. 158–159; *Rivera, supra,* 234 Cal.App.4th at p. 1356 [extending the holding of *Chiu* to conspiracy].)

When a trial court instructs a jury on multiple theories of guilt and one theory is legally incorrect, reversal is required unless the reviewing court can declare beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Chiu, supra,* 59 Cal.4th at p. 167; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [jury instruction on an unsupported theory is prejudicial if it was the sole basis for a guilty verdict. If the jury based its verdict on a valid ground, or on both a valid and invalid ground, there would be no prejudice.].) The People bear the burden to establish that these instructional errors were harmless. (*People v. Smith* (1984) 35 Cal.3d 798, 808; *In re Loza* (2018) 27 Cal.App.5th 797, 805.)

Respondent asserts that the jury found true that defendant personally and intentionally discharged a firearm during Victor's murder. According to respondent, this finding establishes that the jury did not rely on the natural and probable consequences doctrine in finding guilt in count 1. We disagree with respondent's reading of the record.

Contrary to respondent's claim, the jury did not determine that defendant personally fired a weapon during Victor's murder. Instead, in count 1, the jury found true that "at least one *principal* intentionally and personally discharged and personally used" a firearm that proximately caused great bodily injury or death under section 12022.53, subdivisions (d) and (e)(1). (Italics added.) The firearm enhancement in count 1 does not establish harmless error. Moreover, in finding defendant guilty in count 1, the jury filled out general verdict forms. The jury did not indicate the basis for finding premeditation and deliberation.

During closing argument, the prosecutor asserted that defendant could be guilty of murder based on multiple theories, including as a coconspirator under the natural and probable consequences doctrine. The prosecutor admitted to the jury that it was "not clear who fired the fatal shot." However, the prosecutor argued that defendant could be found guilty of murder. Victor was shot twice. Either defendant shot him twice, or Montoya shot him twice, or they each shot Victor once. The prosecutor asserted that defendant had an intent to kill because he brought a gun and he was prepared to use it. Three witnesses testified that defendant pointed a gun at Victor. According to the prosecutor, the evidence supported all three theories of guilt in count 1. Either defendant was the direct perpetrator, or he aided and abetted, or defendant was "responsible for the natural and probable consequence of Victor's shooting." The prosecutor, however, told the jurors that defendant could only be found guilty of second degree murder if they found him guilty under the doctrine of natural and probable consequences.

Respondent notes that the prosecutor correctly informed the jury during closing argument that defendant could only be guilty of second degree murder if his conviction was based on the natural and probable consequences doctrine. Respondent contends that this admonition (along with respondent's erroneous understanding of the firearm enhancement in count 1) establish harmless error. Respondent is mistaken.

The trial court instructed the jurors that they had to follow the law as explained by the court. If an attorneys' comments on the law were in conflict, the jurors were to follow the court's legal instructions. We presume that the jury followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

The court informed the jury that defendant could be guilty of first degree murder based on conspiracy. In addition, the court provided the jury with a copy of the written jury instructions during deliberations. The written instructions appearing in this record contain the same errors and other misleading statements that suggested defendant could be guilty of first degree premediated murder based on the conspiracy charge and the

natural and probable consequences doctrine. As such, even though the prosecutor gave his admonitions during closing argument, we cannot conclude beyond a reasonable doubt that the instructional errors were harmless. The jury did not find that defendant personally discharged a firearm during Victor's murder, only that "at least one principal" did so, which proximately caused death.

Finally, during deliberations, the jury sent a written note to the trial court. The note stated that the jurors were "unsure" about the legal definition of premeditation and how it "pertains to this case." The jury asked for a further definition. After conferring with the parties, the trial court directed the jury to review CALCRIM No. 521. The court stated that it was the jury's role to determine how to apply premeditation.

The instruction under CALCRIM No. 521 informed the jury that defendant was being prosecuted for first degree murder under three theories, including "conspiracy." As such, CALCRIM No. 521 does not alleviate any concern regarding the instructional errors. To the contrary, the instruction given under CALCRIM No. 521 reinforces the concern that one or more jurors may have found defendant guilty of first degree premeditated murder based on a theory he was vicariously liable as a coconspirator under the natural and probable consequences doctrine.

Based on this record, overwhelming evidence demonstrated defendant's liability for Victor's murder. Defendant went to the party with a loaded gun, and multiple witnesses identified him as Victor's initial attacker. No evidence suggested that Victor was armed, but multiple witnesses saw defendant draw his weapon and fire it twice at Victor. There was, however, a second shooter and it was unclear who fired the fatal shots.

Although the evidence conclusively established defendant's liability for murder, the trial court presented the jury with a legally invalid theory regarding first degree premediated murder. We cannot declare beyond a reasonable doubt that the jury based

its guilty verdict in count 1 on a legally valid theory.[9] As such, we must reverse defendant's conviction for first degree murder. (*Chiu, supra,* 59 Cal.4th at p. 167; see also *People v. Guiton, supra,* 4 Cal.4th at p. 1130.)

In *Rivera*, the appellate court addressed a similar situation when it reversed a defendant's conviction for first degree murder which had been based on a legally invalid theory. (*Rivera, supra,* 234 Cal.App.4th at p. 1352.) *Rivera* determined that, on remand, the People could either accept a reduction of the defendant's conviction to second degree murder or it could retry the first degree murder charge under a proper theory. The *Rivera* court concluded that, in this situation, the error only impacted the degree of the defendant's murder conviction. (*Id.* at p. 1359.)

We agree with the remedy in *Rivera* and we will use it here. (See *Chiu, supra,* 59 Cal.4th at p. 166 [when an aider and abettor is liable for premeditated murder under the natural and probable consequences doctrine, the appropriate punishment is second degree murder].) Accordingly, we will reduce defendant's conviction in count 1 to second degree murder and affirm the judgment as modified. Upon remand, however, the prosecutor will have the option of retrying the greater offense or accepting the reduction to the lesser offense.

2. Defendant's Conviction for Attempted Murder (Count 2) was Based on a Legally Valid Theory and the Instructional Errors were Harmless

Unlike the conviction in count 1, we reject defendant's claim that his attempted murder conviction in count 2 was based on an invalid legal theory. Our Supreme Court treats *attempted* premeditated murder differently from first degree premeditated murder.

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[9] If the inadequacy of proof is purely factual, then reversal is not required if a valid ground for the verdict remains absent an affirmative indication in the record that the verdict was based on the inadequate ground. However, if the inadequacy is legal and not merely factual, reversal is required "absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton, supra,* 4 Cal.4th at p. 1129, fn. omitted.)

Specifically, an aider and abettor may be vicariously liable for attempted murder if it was the natural and probable consequences of a crime. It is the attempted murder, and not the element of premeditation, which qualifies as the nontarget offense under section 664, subdivision (a). (*Favor, supra,* 54 Cal.4th at p. 879.) It is sufficient if an attempted murder is a reasonably foreseeable consequence of the crime aided and abetted (even under the natural and probable consequences doctrine) so long as the attempted murder itself was committed willfully, deliberately, and with premeditation. (*Id.* at pp. 879–880.)

In *Chiu*, our high court distinguished *Favor* but did not overrule it. (*Chiu, supra,* 59 Cal.4th at p. 163 [finding *Favor* "not dispositive"].) In light of *Favor*, the jury was not presented with a legally invalid theory of guilt in count 2 based on the natural and probable consequences doctrine. Although *Chiu* and *Favor* may appear at odds, *Favor* remains controlling authority, and we are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The parties dispute which standard of review we must apply to analyze the instructional errors. Respondent claims that mere state law error occurred, requiring review under *People v. Watson* (1956) 46 Cal.2d 818. In contrast, defendant contends that the instructional errors impacted his fundamental rights, requiring review under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). We need not resolve the parties' dispute regarding the appropriate standard of review because we can declare that the instructional errors were harmless in count 2 beyond any reasonable doubt.

The evidence overwhelmingly established defendant's guilt for David's attempted murder. Defendant was armed when he attended the house party. The evidence demonstrated that defendant drew his firearm and fired at Victor twice. Victor, however, was unarmed and he never threatened defendant with a weapon. David rushed at defendant and began to wrestle with him for the gun. David broke free from the altercation and he ran towards the house. After a discernable passage of time, the second

shooter (likely Montoya) fired multiple shots, striking David when he reached the front door.

With CALCRIM No. 601, the trial court informed the jurors that, if they found defendant guilty of attempted murder in count 2, they then had to determine whether the prosecution had proven the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. The jury was told that *both* defendant and Montoya had to hold this state of mind in order to find premeditation. The jury found true that David's attempted murder was done with premeditation and deliberation.

The evidence conclusively demonstrated that defendant was either an aider and abettor to David's attempted murder, or this crime was the natural and probable consequences of defendant's conspiracy to unlawfully assemble. In count 4, the jury determined that defendant used a firearm during the commission of conspiracy. No evidence established or even suggested that anyone other than defendant and the second shooter discharged firearms during this event. The evidence also overwhelmingly suggested that the second shooter had ample time to consider and reflect before firing at David, who was fleeing from the altercation. The evidence abundantly established that David's attempted murder was premeditated and deliberate. (*People v. Pearson* (2013) 56 Cal.4th 393, 443 [premeditation and deliberation exist from " 'preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation]"].)

Based on this record, the facts show that the instructional errors were not prejudicial. (*People v. Johnson* (1993) 6 Cal.4th 1, 46.) The evidence established defendant's guilt for David's attempted murder, and the evidence demonstrated that this attempted murder was premeditated and deliberate. As such, any jury misconception about applying the natural and probable consequences doctrine could not have resulted in an improper verdict. (See *People v. Hughes* (2002) 27 Cal.4th 287, 352–353 [finding harmless an instructional error because it could not have produced an improper verdict.) Thus, the guilty verdict rendered in count 2 was surely unattributable to these

instructional errors. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) In other words, these errors were unimportant in relation to everything the jury considered on the issue of defendant's guilt. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) We conclude beyond any reasonable doubt that these instructional errors were harmless. (See *Chapman, supra,* 386 U.S. at p. 24.) Accordingly, prejudice is not present, and this claim fails.

3. Defendant's Conviction for Shooting at an Inhabited Dwelling (Count 3) was Based on a Legally Valid Theory and the Instructional Errors were Harmless

Similar to count 2, we reject defendant's claim that his conviction in count 3 was based on a legally invalid theory. Shooting at an inhabited dwelling is a general intent crime under section 246. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *People v. White* (2014) 230 Cal.App.4th 305, 316.) "A defendant may be liable for shooting at an inhabited dwelling as an aider and abettor. [Citation.]" (*People v. White, supra,* p. 317.) Apart from first degree premeditated murder, our high court has approved of the use of the natural and probable consequences doctrine to establish the liability of a coconspirator. (*People v. Hardy* (1992) 2 Cal.4th 86, 188 [approving a jury instruction that a conspirator is vicariously liable for the unintended acts by coconspirators in furtherance of the conspiracy or as the reasonable and natural consequence of the conspiracy].)

As in count 2, the parties dispute the appropriate standard of review to use in count 3 stemming from the instructional errors. We disagree with defendant that the instructional errors violated his federal constitutional rights. In any event, we can declare beyond any reasonable doubt that the errors were harmless. The evidence overwhelmingly established that either defendant and/or the second shooter (likely Montoya) fired at the inhabited dwelling. Either as a direct perpetrator, or as an aider and

abettor, or because of the natural and probable consequences from the conspiracy, the evidence conclusively demonstrated defendant's guilt in count 3.

Based on this record, the evidence overwhelmingly established defendant's guilt for shooting at an inhabited dwelling. As such, we can declare beyond any reasonable doubt that the instructional errors were harmless. (See *Chapman, supra,* 386 U.S. at p. 24.) In other words, the guilty verdict rendered in count 3 was surely unattributable to the errors. (See *Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Accordingly, prejudice is not present, and this claim fails.

III. We Will Not Consider the Merits of Defendant's Senate Bill No. 1437 Claims

While defendant's appeal was pending, the Governor signed Senate Bill 1437, which became effective on January 1, 2019. Senate Bill 1437 amended the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Under the amendments, a participant in the perpetration of certain enumerated felonies in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer; (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in section 190.2, subdivision (d). (§ 189, subd. (e)(1)–(3).)

Senate Bill 1437 permits those convicted of felony murder or murder under a natural and probable consequences theory to file a petition with the sentencing court to vacate the murder conviction and be resentenced on any remaining counts. (§ 1170.95, subd. (a).) Such a person is entitled to relief if certain conditions are met, including if

they could not have been convicted of first or second degree murder because of these statutory changes. (§ 1170.95, subd. (a)(1)–(3).)

We requested supplemental briefing from the parties regarding the impact, if any, of Senate Bill 1437 on the issues raised in this matter. Defendant contends that he qualifies for resentencing in count 1 (first degree murder) under Senate Bill 1437. Regarding count 2 (attempted murder), he asserts that this court should decide as a matter of law that such a conviction also qualifies for resentencing under Senate Bill 1437.

Various appellate courts have already held that defendants cannot seek relief under Senate Bill 1437 on direct appeal. (*People v. Martinez, supra,* 31 Cal.App.5th at p. 727 [Senate Bill 1437 "should not be applied retroactively to nonfinal convictions on direct appeal"]; accord *People v. Carter* (2019) 34 Cal.App.5th 831, 835; *People v. Anthony, supra,* 32 Cal.App.5th at p. 1153 [adopting *Martinez*'s analysis and holding].) Instead, a qualifying defendant must file a petition in the sentencing court to obtain relief. (§ 1170.95, subd. (a)(1)–(3); *People v. Carter, supra,* 34 Cal.App.5th at p. 835.) We agree with these opinions and we will not revisit that issue. Accordingly, although defendant may pursue these claims below, we will not consider the merits of his Senate Bill 1437 arguments in this appeal.[10] (*People v. Anthony, supra,* 32 Cal.App.5th at p. 1153 [defendants not entitled to consideration of Senate Bill 1437 claims on appeal].)

IV. Defendant has Forfeited his Claims of Prosecutorial Misconduct and he does not Demonstrate Ineffective Assistance of Counsel

During closing argument, the prosecutor asserted that defendant was guilty of murder as a direct perpetrator if he intentionally fired the shot that killed Victor. The prosecutor also stated that, under principles of aiding and abetting, it did not matter whether or not defendant fired the fatal shot so long as he held the specific intent to kill

[10] We take no position regarding the merits of defendant's claims under Senate Bill 1437 or how the sentencing court should rule if defendant elects to pursue those claims upon remand.

and defendant's words and actions actually encouraged Montoya to fire the fatal shot or the shot that wounded David. According to the prosecutor, the evidence did not suggest that defendant was the person who actually fired the shot that struck David. With aiding and abetting, however, that did not matter. The prosecutor contended that defendant demonstrated his intent to kill by his actions during the entire incident in the front yard when he drew his firearm and fired at Victor. The prosecutor stated that those same actions encouraged Montoya to fire the shots that struck David and the house. The prosecutor argued that defendant was "just as guilty as the actual shooter."

Later during his closing argument, the prosecutor stated that an example of premeditation and deliberation is when a driver is approaching an intersection and the green light turns yellow. "At that point, the driver has some decisions to make. Do I slam on the brakes and try to stop? Or do I give it some gas and try to blow through the light? If I do try to blow through the light, am I going to get a ticket? Or worse, am I going to get in a wreck? That is an example of premeditation and deliberation and the amount of time it takes to premeditate and deliberate."

The parties agree, as do we, that the transferred intent doctrine does not apply to attempted murder. Instead, a defendant's guilt for attempted murder must be judged separately for each alleged victim. (*People v. Bland* (2002) 28 Cal.4th 313, 331.) The parties, however, dispute whether or not the prosecutor improperly asked the jury to transfer defendant's intent to kill Victor into an intent to kill David. The parties also dispute whether or not the prosecutor improperly equated running a yellow light with the concept of premeditation and deliberation. Defendant asserts that the prosecutor committed prejudicial misconduct, and he seeks reversal of his convictions for first degree murder (count 1) and attempted murder (count 2).

To resolve the claims of prosecutorial misconduct, however, we need not address all of the parties' disputed points. Instead, we can reject defendant's claims due to forfeiture.

A. Defendant's Claims were Forfeited

As a rule, a claim of prosecutorial misconduct is forfeited if the defense fails to object and fails to request an admonition to cure any harm. (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Tully* (2012) 54 Cal.4th 952, 1010.) "The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Centeno, supra*, 60 Cal.4th at p. 674.)

Here, defendant concedes that his trial counsel failed to object when the prosecutor made these disputed statements. The prosecutor's disputed comments were not so extreme or pervasive that a prompt objection and admonition would not have cured any alleged harm. As such, defendant has not preserved these issues for appeal, and they are forfeited. (*People v. Centeno, supra,* 60 Cal.4th at p. 674; *People v. Tully, supra,* 54 Cal.4th at p. 1010.)

B. Defendant does not Demonstrate Ineffective Assistance of Counsel

To overcome forfeiture, defendant raises ineffective assistance of counsel. Under the federal and state constitutions, a criminal defendant is entitled to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a defendant must establish two criteria: (1) that counsel's performance fell below an objective standard of reasonable competence and (2) that he was thereby prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The defendant has the burden of showing both deficient performance and resulting prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Although a dispute exists whether or not defendant's trial counsel provided ineffective assistance, it is easier to dispose of these claims due to a lack of prejudice. As such, we proceed directly to that issue. (*In re Fields* (1990) 51 Cal.3d 1063, 1079 [a

reviewing court may first analyze prejudice it that is easier to dispose of a claim of ineffective assistance of counsel].)

To establish prejudice, it is not sufficient to show that the alleged errors may have had some conceivable effect on the trial's outcome. Instead, a defendant must demonstrate a "reasonable probability" that the result would have been different absent the alleged error. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*Ibid.*)

We have already determined that defendant's conviction in count 1 for first degree premeditated murder must be reversed. This reversal renders moot defendant's claim of prosecutorial misconduct in count 1. As such, we focus our analysis on David's attempted murder (count 2).

The trial court admonished the jury that, to the extent an attorney's statements regarding the law conflicted with the court's instructions, then the jury was to follow the court's instructions. With CALCRIM No. 521, the court properly instructed the jury on the legal definitions of premeditation and deliberation.[11]

During its deliberations, the jury sent a written note to the trial court. The note stated that the jurors were "unsure" about the legal definition of premeditation and how it "pertains to this case." The jury asked for a further definition. After conferring with the parties, the trial court directed the jury to review CALCRIM No. 521. The court stated that it was the jury's role to determine how premeditation pertained to this case. We presume that the jury followed the court's instructions. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 436.) Nothing from this record reasonably rebuts this presumption.

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[11] Defendant does not cite, and we have not found, any time wherein the court instructed the jury with CALCRIM No. 562 regarding the doctrine of transferred intent.

The jury ultimately determined that David's attempted murder was premeditated and deliberate. The jury did not find true that defendant personally inflicted great bodily injury upon David during his attempted murder. In count 4, however, the jury determined that defendant used a firearm during the commission of conspiracy.

The trial evidence amply supported the jury's verdicts and findings. The record conclusively demonstrated defendant's intent to kill during this incident. He brought a loaded firearm with him to the party. He provoked a fight with Victor. Although Victor was unarmed, defendant drew his weapon and fired it twice at Victor.

The evidence overwhelmingly suggested that the second shooter (likely Montoya) had ample time to consider and reflect before firing the second volley at David while David ran away. The evidence conclusively established that David's attempted murder was premeditated and deliberate. It is beyond any reasonable doubt that defendant held an intent to shoot David, or he aided and abetted the second shooter in firing at David, or David's attempted murder was a reasonably foreseeable consequence of defendant's conspiracy to unlawfully assemble.

Based on this record, defendant has failed to demonstrate a "reasonable probability" that the result would have been different in count 2 had his trial counsel objected to the prosecutor's disputed statements. (See *People v. Williams, supra,* 16 Cal.4th at p. 215.) The evidence overwhelmingly demonstrated defendant's guilt for David's attempted murder. The evidence also conclusively established that this attempted murder was premeditated and deliberate. Our confidence in the outcome of this matter is not undermined. As such, defendant has failed to show the required prejudice to establish ineffective assistance of counsel, and this claim fails. (See *Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Lucas, supra,* 12 Cal.4th at p. 436.)

IV. Remand is Not Warranted for the Trial Court to Exercise Its Sentencing Discretion Under Senate Bill 620

At the time of defendant's sentencing in this matter, the trial court was required to impose additional prison sentences for the firearm enhancements found true under sections 12022.5 and 12022.53. (Former §§ 12022.5, subd. (a), 12022.53, subd. (d).) On October 11, 2017, however, the Governor approved Senate Bill 620, which amended, in part, sections 12022.5 and 12022.53. Under the amendments, a trial court now has discretion to strike or dismiss these firearm enhancements. (§ 12022.5, subd. (c), § 12022.53, subd. (h).)

The parties agree, as do we, that these amendments apply retroactively to defendant because his case is not yet final. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties, however, disagree whether remand is appropriate. Respondent asserts that a remand would serve no purpose. According to respondent, no reasonable court would exercise its discretion to strike defendant's firearm enhancements in light of his criminal conduct in this matter and the court's comments at sentencing. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) We agree.

During sentencing, the trial court stated that defendant "and his peers arrived at a party unwelcome, engaged in a verbal altercation, which escalated to [defendant] personally discharging a firearm multiple times resulting in the death of one victim and a serious injury to the second. He has shown through his actions that he is a serious danger to the community and a prison sentence is justified and will be imposed."

In count 1 (first degree premeditated murder), defendant was sentenced to an indeterminate term of 25 years to life. This term was required by law. (§ 190, subd. (a).) This sentence was enhanced by 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). The length of this firearm enhancement was mandatory at that time. (Former § 12022.53, subds. (d) & (e)(1)).

In count 2 (attempted premeditated murder), the court imposed an indeterminate term of life with the possibility of parole after seven years. Parole eligibility in seven years is mandated by statute. (§ 664, subd. (a); § 3046, subd. (a).) This sentence was enhanced by 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). The length of the enhancement was mandatory at that time. (Former § 12022.53, subds. (d) & (e)(1)). Count 2 was ordered to be served consecutively to count 1.

In count 3 (shooting at an inhabited dwelling), defendant was sentenced to an indeterminate term of 15 years to life. The length of this term was required by law. (§ 186.22, subd. (b)(1)(B).) This sentence was enhanced by 20 years for the firearm enhancement. The length of this firearm enhancement was mandatory at that time. (Former § 12022.53, subds. (c) & (e)(1).) The sentence in this count was stayed pursuant to section 654.

In count 4 (conspiracy), the court imposed the midterm sentence of two years. This sentence was enhanced by 10 years for the firearm enhancement under section 12022.5, subdivision (a), and by four years for the gang enhancement under section 186.22, subdivision (b)(1). This 10-year firearm enhancement was the maximum possible term under the statute. (§ 12022.5, subd. (a)).[12] The sentence in count 4 was stayed pursuant to section 654.

We agree with respondent that a remand is unwarranted in this situation. The court was very disturbed over defendant's actions. In count 4, the court imposed the maximum firearm enhancement possible under section 12022.5, subdivision (a). That sentencing choice establishes that the court would not have struck or dismissed a firearm enhancement if it had such discretion. As such, it would be an idle act to remand this

[12] Under section 12022.5, subdivision (a), a sentencing court has discretion to impose an additional consecutive term of imprisonment for three, four or 10 years for any person who personally uses a firearm in the commission of a felony or its attempt.

matter for the court to reconsider the firearm enhancements. (See *People v. Gutierrez, supra,* 48 Cal.App.4th at p. 1896 [denying remand after sentencing court indicated it would not have exercised its discretion to strike a Three Strikes prior even if it had believed it could have done so]; *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Gamble* (2008) 164 Cal.App.4th 891, 901 [if " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.' [Citation.]"].) Accordingly, we deny defendant's request for remand for the court to exercise its discretion to strike or dismiss the firearm enhancements.

DISPOSITION

Defendant's conviction for first degree murder is reversed with the following directions: If the People do not bring defendant to retrial within 60 days of filing the remittitur in the trial court pursuant to section 1382, subdivision (a)(2), or obtain a waiver of time by defendant, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder in count 1 and resentence the defendant accordingly. In all other respects, defendant's judgment is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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MEEHAN, J.